

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

LARRY McGEE,

Plaintiff,

Case No. 2:11-cv-495

v.

Honorable Gordon J. Quist

UNKNOWN PART(Y)(IES),

Defendant.

OPINION DENYING LEAVE
TO PROCEED *IN FORMA PAUPERIS* - THREE STRIKES

Plaintiff Larry McGee, a prisoner incarcerated at Marquette Branch Prison, filed a complaint pursuant to 42 U.S.C. § 1983. Plaintiff seeks leave to proceed *in forma pauperis*. Because Plaintiff has filed at least three lawsuits that were dismissed as frivolous, malicious or for failure to state a claim, he is barred from proceeding *in forma pauperis* under 28 U.S.C. § 1915(g). The Court will order Plaintiff to pay the \$350.00 civil action filing fee within twenty-eight (28) days of this opinion and accompanying order, and if Plaintiff fails to do so, the Court will order that his action be dismissed without prejudice. Even if the case is dismissed, Plaintiff will be responsible for payment of the \$350.00 filing fee in accordance with *In re Alea*, 286 F.3d 378, 380-81 (6th Cir. 2002).

Discussion

The Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996), which was enacted on April 26, 1996, amended the procedural rules governing a prisoner's request for the privilege of proceeding *in forma pauperis*. As the Sixth Circuit has stated, the PLRA was "aimed at the skyrocketing numbers of claims filed by prisoners – many of which are meritless – and the corresponding burden those filings have placed on the federal courts." *Hampton*

v. Hobbs, 106 F.3d 1281, 1286 (6th Cir. 1997). For that reason, Congress put into place economic incentives to prompt a prisoner to “stop and think” before filing a complaint. *Id.* For example, a prisoner is liable for the civil action filing fee, and if the prisoner qualifies to proceed *in forma pauperis*, the prisoner may pay the fee through partial payments as outlined in 28 U.S.C. § 1915(b). The constitutionality of the fee requirements of the PLRA has been upheld by the Sixth Circuit. *Id.* at 1288.

In addition, another provision reinforces the “stop and think” aspect of the PLRA by preventing a prisoner from proceeding *in forma pauperis* when the prisoner repeatedly files meritless lawsuits. Known as the “three-strikes” rule, the provision states:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under [the section governing proceedings *in forma pauperis*] if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). The statutory restriction “[i]n no event,” found in § 1915(g), is express and unequivocal. The statute does allow an exception for a prisoner who is “under imminent danger of serious physical injury.” *Id.* The Sixth Circuit has upheld the constitutionality of the “three-strikes” rule against arguments that it violates equal protection, the right of access to the courts, and due process, and that it constitutes a bill of attainder and is *ex post facto* legislation. *Wilson v. Yaklich*, 148 F.3d 596, 604-06 (6th Cir. 1998); *accord Pointer v. Wilkinson*, 502 F.3d 369, 377 (6th Cir. 2007) (citing *Wilson*, 148 F.3d at 604-06); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999); *Rivera v. Allin*, 144 F.3d 719, 723-26 (11th Cir. 1998); *Carson v. Johnson*, 112 F.3d 818, 821-22 (5th Cir. 1997).

Plaintiff has been an active litigant in the federal courts in Michigan, having filed more than one hundred civil actions in this Court. The Court has dismissed at least three of

Plaintiff's lawsuits as frivolous or for failure to state a claim. *See McGee v. MDOC et al.*, No. 1:00-cv-78 (W.D. Mich. Apr. 14, 2000); *McGee v. Tyszkiewicz et al.*, No. 1:99-cv-132 (W.D. Mich. Mar. 12, 1999); *McGee v. McGinnis et al.*, No. 1:99-cv-94 (W.D. Mich. Mar. 5, 1999). In addition, Plaintiff has been denied leave to proceed *in forma pauperis* in this Court on numerous occasions because he has three strikes.

Moreover, Plaintiff's allegations do not fall within the exception to the three-strikes rule because he does not allege any facts establishing that he is under imminent danger of serious physical injury. Plaintiff's allegations are somewhat difficult to decipher, but the Court discerns four sets of allegations that are relevant to the imminent-danger inquiry. First, Plaintiff states that someone "set [him] up . . . to be held even in c-block where [he] got poison on first shift at lunch time" (Compl., docket #1, Page ID#2.) Second, Plaintiff complains about the food in prison, stating: "no beans for lunch with hot dog, but had cook. I did not eat no [fruit]. Dinner Hamburger with med[ium] hard potatoes cuts, mostly from Monday less Hot meals, sections of course less meat" (*Id.* at Page ID#3.) In connection with his complaint about the food, he requests a restraining order "of the acts against the less meat and [fruit] for regular trays and breads in the morning meals and the meal of bake cake that they bake in chow halls cold oat meal Monday of . . . November, now it is the same" (*Id.*) Third, Plaintiff complains about his "tooth . . . on upper left back," which needs to be pulled. In a medical kite filed on November 24, 2011, Plaintiff wrote: "need upper left back tooth pull[ed,] it hurt[s] my gum and it need[s] to be pull[ed] out." (Compl., Attach 1, docket #1-1, Page ID#7.) Finally, in the same kite, Plaintiff complained that his scalp irritated him because it was dry and itchy. (*Id.*) In a response dated November 28, 2011, a prison official indicated that Plaintiff would be added to the "sick call" list for his scalp and added to the dental list for his tooth. (*Id.*) Plaintiff alleges that the doctor was in his unit on December 1, 2011, though it is not clear whether Plaintiff was seen at that time. (Compl., docket #1, Page ID#3.)

Congress did not define “imminent danger” in the PLRA, but it is significant that Congress chose to use the word “imminent,” a word that conveys the idea of immediacy. “Imminent” is “Near at hand . . . impending; on the point of happening; threatening, menacing, perilous. Something which is threatening to happen at once, something close at hand, something to happen upon the instant . . . and on the point of happening.” BLACK’S LAW DICTIONARY, 514-15 (6th ed. 1991). “Imminent” is also defined as “ready to take place, near at hand, impending, hanging threateningly over one’s head, menacingly near.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, 1130 (1976). “Imminent danger” is “such an appearance of threatened and impending injury as would put a reasonable and prudent man to his instant defense.” BLACK’S LAW DICTIONARY, 515 (6th ed. 1991).

The Sixth Circuit has recognized the standard previously adopted by other circuit courts:

While the Sixth Circuit has not defined the term “imminent danger” for purposes of this section, other Circuits have held that to meet the requirement, the threat or prison condition “must be real and proximate” and the danger of serious physical injury must exist at the time the complaint is filed. *See, e.g., Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001) (en banc). Thus a prisoner’s assertion that he or she faced danger in the past is insufficient to invoke the exception. *Id.* Other Circuits also have held that district courts may deny a prisoner leave to proceed pursuant to § 1915(g) when the prisoner’s claims of imminent danger are “conclusory or ridiculous,” *Ciarpaglini*, 352 F.3d at 331, or are “‘clearly baseless’ (i.e. are fantastic or delusional and rise to the level of ‘irrational or wholly incredible).’” *Gibbs v. Cross*, 160 F.3d 962, 967 (3d Cir.1998) (quoting *Denton v. Hernandez*, 504 U.S. 25, 33 (1992)).

Rittner v. Kinder, 290 F. App’x 796, 797-98 (6th Cir. 2008); *see also Vandiver v. Vasbinder*, 416 F. App’x 560, 561-62 (6th Cir. 2011) (imminent danger must be contemporaneous with the complaint’s filing); *Pointer v. Wilkinson*, 502 F.3d 369, 371 n.1 (6th Cir. 2007) (holding that assertions of past danger do not satisfy the imminent-danger exception). In addition, the Sixth

Circuit has held that, where a prisoner has disputed the adequacy of medical treatment for a period of years but failed to allege any serious injury in other than a conclusory fashion, he failed sufficiently to allege imminent danger. *See Sweatt v. Tenn. Dep't of Corr.*, No. 00-5874, 2001 WL 128357, at *1 (6th Cir. Feb. 6, 2001).

Although Congress also did not define “serious physical injury,” various courts have interpreted the meaning of the phrase. In *Ibrahim v. District of Columbia*, 464 F.3d 3, 7 (D.C. Cir. 2006), the D.C. Circuit concluded that a “chronic disease that could result in serious harm or even death constitutes ‘serious physical injury.’” *Id.* Similarly, in *Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004), the Eleventh Circuit found that HIV and Hepatitis C, both chronic and potentially fatal diseases, met the “serious physical injury” requirement. Moreover, in *Ciarpaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003), the Seventh Circuit recognized that “heart palpitations, chest pains, labored breathing, choking sensations, and paralysis in . . . legs and back” resulting from a denial of medication constituted a serious physical injury. *Id.* The Eighth Circuit also has addressed the question, concluding that a spreading infection in the mouth that resulted from a lack of proper dental treatment amounted to a serious physical injury. *McAlphin v. Toney*, 281 F.3d 709, 710 (8th Cir. 2002).

First, Plaintiff’s allegation regarding the poison involves a past incident, which is insufficient, in itself, to invoke the exception because it does not suggest a future risk of harm. *See Rittner*, 290 F. App’x at 797-98. Second, there is no indication that the changes to Plaintiff’s meals present a risk of harm, much less a risk of serious physical injury. Finally, Plaintiff does not allege any possible consequences resulting from a delay in treating his scalp or tooth. Unlike the prisoner in *McAlphin*, Plaintiff does not allege that a delay in treatment of his tooth would allow an infection to spread in his mouth. *See McAlphin*, 281 F.3d 710. Clearly not every physical pain or discomfort experienced by a prisoner presents an imminent threat of serious physical injury. Moreover, it

appears that prison officials have responded to Plaintiff's medical concerns by placing him on the list to see a doctor and/or dentist. For the foregoing reasons, therefore, Plaintiff's allegations do not satisfy the imminent-danger exception to the three-strikes rule.

In light of the foregoing, § 1915(g) prohibits Plaintiff from proceeding *in forma pauperis* in this action. Plaintiff has twenty-eight (28) days from the date of entry of this order to pay the entire civil action filing fee, which is \$350.00. When Plaintiff pays his filing fee, the Court will screen his complaint as required by 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c). If Plaintiff fails to pay the filing fee within the 28-day period, his case will be dismissed without prejudice, but he will continue to be responsible for payment of the \$350.00 filing fee.

Dated: December 16, 2011

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

SEND REMITTANCES TO THE FOLLOWING ADDRESS:

Clerk, U.S. District Court
399 Federal Building
110 Michigan Street, NW
Grand Rapids, MI 49503

All checks or other forms of payment shall be payable to "Clerk, U.S. District Court."